MAHADEVA KRISANON A

v.

TEJA SINGH

HIGH COURT MALAYA, PULAU PINANG B
CHEW SOO HO JC
[CIVIL SUIT NO: 22-396-2003]
29 APRIL 2010

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to call witness - Whether witness was a necessary witness - Adverse inference only to be invoked for wrongful withholding or suppression of material witness* C

EVIDENCE: *Similar fact evidence - Admission of - Whether relevant and admissible under s. 15 of the Evidence Act 1950 - Solicitor discharging himself due to client's failure to provide proper documents and instruction - Whether evidence of client's previous solicitor discharging himself under similar circumstances was relevant and admissible* D

EVIDENCE: *Witness - Credibility - Assessment of credibility based on demeanour - Multiple material inconsistencies and contradictions - Demeanour of evasiveness in answering questions - Doubt as to plaintiff's credibility as a truthful witness* E

LEGAL PROFESSION: *Duty of care - Solicitors - Failure to file claim in court before expiry of limitation period - Whether solicitor had properly discharged himself before expiry of limitation - Whether breach of duty of care proved on balance of probabilities - Whether damages proved* F

LEGAL PROFESSION: *Retainer - Discharge as solicitors - Whether solicitors for accident claimant had properly discharged himself - Whether failure by claimant to provide proper documents and instruction to solicitor - Whether solicitor entitled to discharge himself - Whether notice of discharge properly given* G

TORT: *Negligence - Professional negligence - Solicitors - Failure to file claim in court before expiry of limitation period - Whether solicitor had properly discharged himself before expiry of limitation - Whether negligence proved on balance of probabilities - Whether damages proved* H

I

A The plaintiff herein claimed to have been involved in a traffic accident on 10 September 1996 at about 4.30am while riding motorcycle No. PCV 1125. He claimed that motorcycle No. PCX 5434 had collided into him from behind. The defendant was retained by the plaintiff on 11 January 1997 to act for him to claim B damages arising out of the said accident. The plaintiff alleged that he had given detailed statement of the accident to the defendant and the defendant had written to the relevant authorities for all relevant reports and documents and had sent a notice of action to the insurer of the motorcycle PCX 5434. However, the plaintiff C alleged that the defendant failed to file the claim in court within the six years limitation. Hence the plaintiff's claim for damages against the defendant. The plaintiff said that each time he went to the defendant's office, the defendant only told him to wait and that his case would take a long time. The defendant's defence was that D the version of the accident pleaded by the plaintiff differed materially from the instruction given to him. The defendant averred that he was appointed on 10 November 1997 and no police report or any other documents except an out-patient card, were given by the plaintiff. Numerous letters (dated 11 October 1997 (D19), 6 E February 1998 (D10), 4 March 1998 (D11), 12 August 1998 (D12) and 26 February 1999 (D13)) had been sent to the plaintiff calling him to come to the defendant's office for instruction but plaintiff had never showed up. The defendant was unable to act further and had no choice but to discharge himself *vide* his letter dated 26 F February 1999 (exh. D13), three years before the limitation had set in. It was more than four years after the defendant had discharged from acting for the plaintiff that the plaintiff lodged a police report of the alleged accident and sued the defendant. The main issue was whether the plaintiff had proved his case against the defendant and G whether the defendant had duly discharged from acting for the plaintiff before expiration of the six years limitation period.

Held (dismissing the plaintiff's claim with costs):

H **(1)** There was no corroboration to the plaintiff's evidence that he had given all documents to the defendant. The defendant's evidence was supported by all the letters that he had sent to the plaintiff. The plaintiff's evidence was, however, assertions which were unsubstantiated. He alleged he had attended defendant's I office on various occasions with persons named Ravi or Sara but both Ravi and Sara were not called to testify. (para 6)

(2) The defendant had exhibited the five letters which the plaintiff had not objected to and in fact D19 was enclosed in the plaintiff's own bundle of documents. The plaintiff had also admitted in examination-in-chief that he did receive D10 and D11 though he denied receiving D12 and D13. All these letters established a fact that the plaintiff was called to come to the defendant's office for instruction or to produce the relevant documents but the plaintiff had not responded. (para 8)

(3) Although the defendant had no documentary proof of the posting of the said letters, he had explained that his register of posting of documents kept by his office was destroyed when his office was hit by a storm. In the absence of any contrary evidence nor challenge, the court accepted the defendant's explanation. (para 9)

(4) It was not necessary for the defendant to call his former clerk named Nor Azizah who had prepared the letters because the fact that the letters were prepared by her was not disputed. A witness who in the opinion of a party is unnecessary or is obviously hostile is not bound to be called as a witness. Section 114(g) of the Evidence Act 1950 is only invoked if there is wrongful withholding or suppression of material witness or evidence and not for mere non-calling of a witness. (para 9)

(5) DW2, the former solicitor retained by the plaintiff to pursue a claim for damages arising from the same accident testified that the plaintiff had asked him to act but had failed to give further instructions. According to DW2, he had therefore sent the plaintiff a final notice on 9 April 1998 and proceeded to close his file. Evidence of DW2 was relevant to show that the plaintiff had similarly failed to give further instructions to his previous solicitors resulting in the previous solicitors having to give notice to discharge themselves which was similar to the defendant's position. (para 10)

(6) Both defendant and DW2 had discharged from acting for the plaintiff long before the expiry of the limitation period. If a solicitor has discharged himself well before the expiry of the limitation period for good and valid reasons, the issue of negligence can no longer arise nor can negligence be attributed to him. (para 11)

A **(7)** There were multiple material inconsistencies and contradictions as well as the demeanour of evasiveness in answering the questions, all of which gave rise to a grave doubt as to the plaintiff's credibility as a truthful witness. (para 14)

B **(8)** There was absolutely no evidence to prove the special and general damages. The plaintiff had failed to prove his injuries which he could have done so by proving the medical reports but failed to do so. The injuries could not be simply assumed. (para 20)

C **Case(s) referred to:**
Fletcher & Son v. Jubb Booth & Helliwell [1920] 1 KB 275 ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Jacks v. Bell [1828] 3 C & P 316 ***(refd)***
Teh Lee Tong v. Rex [1951] 1 LNS 96 HC ***(refd)***

D **Legislation referred to:**
Evidence Act 1950, ss. 15, 101, 114(g)

Other source(s) referred to:
Roger Billins, *Solicitors' Duties And Liabilities*, 1999, pp 147-152

E *For the plaintiff - Darshan Singh; M/s Darshan Singh*
For the defendant - Raam Kumar; M/s KB Tan Kumar & Partners

Reported by Amutha Suppayah

F

JUDGMENT

Chew Soo Ho JC:

G **Brief Facts**

[1] Plaintiff pleaded that he was involved in a traffic accident on 10 September 1996 at about 4.30am while riding motorcycle No. PCV 1125 at Jalan Mount Erskine, Penang towards the direction of Jalan Burma after the junction of Jalan Gottlieb/Jalan Mount
H Erskine/Jalan Burma, Penang where he was collided into by motorcycle No. PCX 5434 from behind. As a result of this accident, plaintiff suffered severe injuries and permanent disablement. Defendant was retained by the plaintiff on 11 January 1997 to act
I for the plaintiff to claim damages arising out of the aforesaid accident. Plaintiff alleged that he had given detailed statement of

the accident to the defendant and defendant had written to the General Hospital, Traffic Police and Road Transport Department for all relevant reports and documents; thereafter, defendant had also sent a notice of action to the People's Insurance Co (M) Bhd being the insurer of the motorcycle PCX 5434. However, plaintiff alleged that the defendant had failed to file the claim in court within the six years limitation from 10 September 1996 ie, on or before 9 September 2002. On account of defendant's negligence or his breach of contract or duty of care, plaintiff has suffered losses and damages. Hence he claimed general damages, special damages quantified at RM1,002,700, punitive and exemplary damages, interest and costs.

[2] The defendant's defence is that the version of event of the accident pleaded by the plaintiff differed materially from the instruction given to him in that the accident occurred on 9 September 1996 at about 3am at the junction of Jalan Gottlieb/Jalan Burma/Jalan Mount Erskine when plaintiff proceeded on after the traffic light had turned green, a car had suddenly crossed its path from Jalan Mount Erskine resulting in plaintiff having to brake abruptly which then resulted in his motorcycle being collided into from behind by motorcycle No. PCX 5434. Defendant averred that when he was appointed on 10 November 1997, it was one year two months after the accident. No police report or its number or any other documents except an out-patient card, were given by the plaintiff. Numerous letters had been sent to the plaintiff calling him to come to defendant's office for instruction but plaintiff had never showed up. Defendant was unable to act further and had no choice but to discharge himself *vide* his letter dated 26 February 1999. Such discharge was three years before the limitation had set in. It was more than four years after the defendant had discharged from acting for the plaintiff that the plaintiff lodged a police report of the alleged accident and sued the defendant.

The Issues

[3] Plaintiff's solicitor Mr. Darshan Singh in his written submission submitted that there is only one issue which is whether the plaintiff had discharged the defendant and whether the defendant's retainer terminated before the six years limitation.

[4] Defendant's solicitor Mr. Raam Kumar, on the other hand, raised three issues as follows:

(i) Has the plaintiff shown any evidence that the alleged accident on 10 September 1996 is genuine?

(ii) Has the plaintiff given any documents to the defendant to allow him to act for the plaintiff?

(iii) Has the burden shifted to the defendant to rebut the plaintiff's alleged negligence.

[5] The plaintiff sued the defendant basically for negligence for failure to file his claim for damages arising out of the aforesaid road accident within the six years limitation period. Defendant's case is that as there was no response from the plaintiff for further instructions though having been repeatedly requested to call on his office *via* numerous letters, defendant had no choice but to discharge himself from acting for the plaintiff. This was done *vide* his letter to the plaintiff, exh. D13. Hence the main issue is whether the plaintiff had proved his case against the defendant on a balance of probabilities and whether the defendant had duly discharged from acting for the plaintiff and that such discharge was before the expiration of the six years limitation period for filing the plaintiff's claim.

Evaluation & Findings

[6] Evidence of this case shows that there is no dispute that the defendant was appointed by the plaintiff on 11 October 1997 to act for him in the claim for damages arising out of the alleged traffic accident that occurred on 10 September 1996. It was also admitted by the plaintiff that he had appointed the defendant more than one year after the date of the alleged accident after his first solicitors Messrs. Haniff & Chew had closed his file. Plaintiff said that he went with one Ravi to see the defendant and he had given all documents to the defendant. Learned counsel for the plaintiff was attempting to say that Ravi was the defendant's tout when he cross-examined the defendant which the defendant vehemently denied. However, plaintiff did not call Ravi to testify and there is therefore no evidence as to who this Ravi was and all the most there is no corroboration to the plaintiff's evidence that he had given all documents to the defendant. In cross-examination, plaintiff also said

that he had seen the defendant in the year 2002 with his friend named Sara. He went in Sara's car or on Sara's motorcycle. However, this Sara was not called to lend credence to his evidence. Plaintiff also stated that each time he went to defendant's office. Defendant only told him to wait and that his case would take a long time. At times when defendant was not in his office, his sister named 'Goodi' (DW3) who worked in the defendant's office would inform him to come again. Plaintiff added that at the end of 2002, he met defendant in the latter's office and was informed that defendant could not proceed with his case as defendant had expended money to obtain medical report, police report, JPJ reports etc. In March 2003, plaintiff saw defendant again but defendant did not inform him that he did not file the claim within the limitation period and that plaintiff's claim was statute-barred. On 16 June 2003 when he went to defendant's office, defendant had informed him that his file was closed and that it was defendant's clerk who had failed to take note of the six years limitation and had it recorded in the diary. It was alleged that defendant said he had forgotten. Hence plaintiff said that defendant was negligent and had breached his duty of care to the plaintiff.

[7] In this respect, defendant's evidence is emphatic that after the plaintiff had seen and appointed him on 11 October 1997, plaintiff informed him of the accident which differed from the plaintiff's version as pleaded and as to the documents, plaintiff only gave him a 'Kad Pesakit Luar' and executed a consent form to apply for his medical report but when asked about plaintiff's police report, plaintiff said he would give the report number and would get back to the defendant later. However, plaintiff had never done so despite the defendant's repeated letters to him dated 11 October 1997 (D19), 6 February 1998 (D10), 4 March 1998 (D11), 12 August 1998 (D12) and the last letter 26 February 1999 (D13), to call at defendant's office or to supply the requisite documents. Defendant explained that during the material time, the police would not entertain any application or request for documents without at least the police report number. He could not proceed to write to the police without the report number. In the last letter D13, defendant had expressly informed the plaintiff that the plaintiff had failed to come to defendant's office for further instruction and on account of that, defendant was unable to proceed further with plaintiff's claim and notice was given to the plaintiff that should plaintiff fail to

A show up within 14 days from the date of the letter ie, from 26 February 1999, defendant would close plaintiff's file. Since the plaintiff did not call at the defendant's office upon the final notice *vide* D13, defendant asserted that he had discharged himself from acting for the plaintiff. At the time of his discharge, there were
B three more years before the expiry of the six years limitation which was due on 9 September 2002.

[8] From the evidence of both the plaintiff (PW1) and the defendant (DW1), they are apparent conflicting versions with the
C plaintiff saying he had been to the defendant's office on various occasions to inquire about his claim whereas the defendant is emphatic that plaintiff had never responded to his requests to come forward for instruction; consequently, he had no alternative but to discharge himself. Faced with such situation, it is upon this court
D to find which of the versions of the parties to be more probable on a balance of probabilities. Evidence of defendant is supported by all the letters D19, D10-D13 that he had sent to the plaintiff. Plaintiff's evidence was, however, assertions which are unsubstantiated. He alleged he had attended defendant's office on
E various occasions but this court is unable to find any evidence from him as to when he had attended as no dates were given by the plaintiffs prior to defendant's discharge from acting for him. He claimed he had gone with Ravi or Sara but both Ravi and Sara were not called to testify. Learned counsel for the plaintiff submitted that
F Ravi was the contact man as his telephone number was given to the defendant since plaintiff had no telephone and defendant should have called him and not the plaintiff. Defendant explained that they had contacted Ravi to inform plaintiff to come for further instruction but plaintiff did not show up. In this respect, it must be
G borne in mind that the plaintiff bears the burden to prove his case. He who asserts must prove the fact that he asserted; see s. 101 Evidence Act 1950. It was the plaintiff who asserted that he had gone to defendant's office with the said Ravi and Ravi witnessed that he had handed documents to the defendant. Plaintiff must
H prove that fact by calling Ravi and not defendant; see *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31 FC *(infra)*. The defendant had exhibited five letters D19, D10-D13 which the plaintiff had not objected to and in fact D19 was enclosed in the plaintiff's own bundle of documents marked 'B' and plaintiff had
I also admitted in examination-in-chief that he did receive D10 and D11 though he denied receiving D12 and D13. All these letters

established a fact that plaintiff was called to come to defendant's office for instruction or to produce the relevant documents or information requested for but the plaintiff had not responded. In the light of these exhibits, there is an onus on the plaintiff to rebut them since this onus of proof shifted to him and it is incumbent upon him to adduce sufficient evidence on this onus to rebut defendant's evidence and the exhibits tendered. In *International Times & Ors v. Leong Ho Yuen (supra)*, His Lordship Salleh Abas FJ (as he then was) in delivering the decision of the Federal Court had succinctly explained the distinction between burden of proof and onus of proof in the following:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa & Ors* and *Raghavama v. Chenchamma*). The first sense signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander,* 7th Edition paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[9] From the evidence, the mere assertion and denial without more by the plaintiff in the light of all the documentary evidence adduced by the defendant, cannot be said to be sufficient evidence to satisfy his onus of proof and he must be construed to have failed to rebut the documentary evidence which showed explicitly that he had been repeatedly requested to call on the defendant's office but had declined to respond resulting in the defendant discharging himself as he could not proceed with plaintiff's claim any further. Although defendant had no documentary proof of the posting of the aforesaid letters D19, D10-D13, he had given explanation that his

register of posting of documents kept by his office was destroyed along with other documents when his office was hit by a storm. In the absence of any contrary evidence nor challenge, this court accepts defendant's explanation. Learned counsel for the plaintiff had contended that defendant should have called his former clerk named Nor Azizah binti Saad who handled the whole claim. These letters D19, D10-D13 were physically prepared by the said Nor Azizah as her initial 'n' or 'N' appeared thereon. That may be so but the fact that these letters were prepared by her is not in dispute. Even if she is called, she cannot deny the fact that she had prepared them. In that respect, it may not be necessary to call her. A witness who in the opinion of a party is unnecessary or is obviously hostile is not bound to be called as a witness; see *Teh Lee Tong v. Rex* [1951] 1 LNS 96. Section 114(g) of the Evidence Act 1950 will only be invoked if there is wrongful witholding or suppression of a material witness or material evidence and not on account a mere non-calling of a witness. Be that as it may, plaintiff's evidence is that he met 'Goodi', defendant's clerk who was called as DW3; he had never said he met Nor Azizah at all. The important fact is that the plaintiff had admitted that he had received D19 which is in his own bundle of documents B and admitted in his own examination-in-chief the receipt of the 2 defendant's letters exh. D10 and D11 though they were unsigned. Defendant had explained that it is his practice that he does not sign the copies for his own office. By admitting receipt of D10 and D11 and without any challenge as to the said unsigned copies, the plaintiff must be taken to have accepted that he had received the original of D10 and D11 duly signed as stated by the defendant as can be seen in D19 which the plaintiff had received and which was duly signed by the defendant. As to plaintiff's denial in cross-examination that he had received D12 and D13, I find these letters carried the same address of the plaintiff as in the other two letters D10 and D11 which plaintiff admitted to have received. Plaintiff gave the reason that if he had received he would have attended the defendant's office. However, there is no evidence from the plaintiff to show that after he had received the two earlier letters D10 and D11 from the defendant that he responded and attended defendant's office. He did not even call Sara whom he alleged that he was taken to defendant's office in Sara's car or on his motorcycle. His explanation is lame. From the whole cross-examination of the plaintiff, I must say that the plaintiff had initially denied having

received all the exhs. D19, D11 to D13 but changed his denial as to D19 and D11 which he had admitted in his examination-in-chief when being challenged further. As to D10, it was after its contents having been translated that he finally agreed that he had received this letter. It is so obvious that plaintiff himself was unsure of all these letters to him. This has put his credibility in doubt. His evidence in this respect is reproduced to fortify my observation of plaintiff's demeanour and my doubt as to his credibility.

Ikatan C ms 1 dirujuk (D10).

Saya setuju saya ada terima surat ini.

(Selepas kandungan diterjemah kepada saksi).

Saya tidak terima surat di ms 2 (D11).

S. Tadi peguam anda ada tanya, kata ada terima; sekarang kata tak terima. Kenapa?

J. Sekarang, saya kata ada terima surat di Ikatan C ms 2.

…

Ikatan B ms 11 dirujuk (D19).

Saya tidak terima surat ini.

S. Kenapa kamu berbohong; tadi bila lawyer anda tanya, kamu kata ada terima surat ini?

J. Sekarang saya kata ada terima surat ini.

…

Ikatan C ms 1 dirujuk (D10).

Surat ini bertarikh 6.2.1998.

S. Kenapa anda berdiam diri bila terima surat ini jika anda telah memberi dokumen-dokumen tersebut menurut Ikatan B ms 11?

J. Saya tidak dapat menjawab soalan ini.

[10] On the requested documents in D19, plaintiff said he had given all these documents to the defendant. As stated in D19 those documents defendant requested from plaintiff are police report number, insurance policy, copy of road tax of his motorcycle, registration card, repair bills, medical bills, medical leave, his identify

A card and details of employment and employer. However, plaintiff said in cross-examination he could not remember the police report number; he did not know about the insurance policy or road tax; on one breath, he said the motorcycle belonged to him and changed immediately on the next breath that it belonged to his friend and
B finally changed again to say it belonged to his colleague; he said the registration card was kept in a motor shop but he did know the name of the shop; he agreed he had no repair bill; he did not give the EPF and SOCSO details to the defendant but only the medical bills and his medical leave. This evidence is wholly inconsistent and
C contradictory to his own evidence that he had given all those documents requested by defendant *vide* D19 to the defendant when he himself either did not know those details or did not have them. His credibility is again questionable. Nevertheless it is consistent and more probable with the defendant's evidence that plaintiff had
D not given him any document except a patient's card. From the evidence I am inclined to hold that plaintiff had failed to supply the requisite documents and information or instruction to the defendant despite having received defendant's letters which this court finds to include also D12 and D13 when plaintiff admitted having received
E all the other letters from the defendant. Defendant had called DW2 from Messrs. Hanif & Chew, the former solicitor retained by the plaintiff to pursue the same claim for damages arising from the same accident. DW2 testified that plaintiff saw him once asking DW2 to act for him but thereafter, plaintiff had never come back
F to give him further instructions and because of that, he had sent the plaintiff a final notice on 9 April 1998 and proceeded to close his file. Evidence of DW2 is indeed relevant to show that plaintiff had similarly failed to give further instructions to his previous solicitors after the retainer resulting in the previous solicitors having
G to give notice to discharge themselves which is similar to defendant's position; see s. 15 Evidence Act 1950.

[11] Learned counsel for the plaintiff submitted that it would be improbable that an injured claimant would not have called on his
H lawyer's office as he would be anxious to get his compensation. On this question, I find that it equally applies to a solicitor who would also be anxious to file the claim the soonest possible if he is able to do so as it would similarly be to his advantage and interest. The simple question to ask is "Will a solicitor simply relinquish an
I accident claim when he is able to proceed with the claim?" The

answer is obviously in the negative. The defendant had taken action to write to the JPJ, the Hospital, the Insurance Company and had even drafted the statement of claim (P30); he was only waiting for all relevant particulars to be acquired to fill in the blanks. This court finds it implausible and highly improbable that he would not proceed with the claim except for reason that the plaintiff had not come forward to give further instruction and/or to coordinate defendant's necessary action such as to accompany him to sign a fresh consent in the hospital as required by the Hospital's Record Office for his medical report or to advise plaintiff to lodge a fresh police report if he had not lodged one. Both Mr. Teja Singh, the defendant and En. Mohamed Haniff bin Ahmed Shariff, the plaintiff's previous solicitor, said the same reason that plaintiff had not showed up and had not given them further instruction and for that, they gave final notice to the plaintiff and subsequently closed their respective files. I find no reason to doubt their evidence.

[12] Defendant had discharged from acting for the plaintiff 14 days from his final notice dated 26 February 1999 (D13) and DW2 discharged himself on 9 April 1998 (D8). The expiry of the limitation of six years was on 9 September 2002. Vividly, both defendant and DW2 had discharged from acting for the plaintiff long before the expiry of the limitation period. If a client is not interested in his own claim, I do not see how his lawyer could proceed with the matter. The situation would certainly be different if all relevant and requisite materials were supplied to the lawyer which enabled him to prepare and file the case in court and yet the lawyer failed to do so. This is not the case here. The defendant had explained that during the material time, the police department will not entertain any application for documents if there was no report number being forwarded as it was not computerized at the material time. The plaintiff had failed to supply defendant with the report number. Defendant, therefore could not act further. According to defendant, the police report of the accident and relevant documents of investigation would be necessary to determine liability in the claim. As regards plaintiff's medical report, defendant had written to the Record Office of the General Hospital, Penang for the said medical report *vide* his letters D14, D15 and D16. *Vide* its letter dated 8 February 1999 (D17) the Penang Hospital had replied to defendant's last reminder letter, D16, requesting the plaintiff to call at the Record Office of the Hospital to sign anew as his consent letter given earlier was found to be doubtful. Defendant

A then wrote to the plaintiff *vide* D13 dated 26 February 1999 requesting plaintiff to attend his office so that they could do the needful to bring the plaintiff to the Hospital. In this same letter, the plaintiff was also given the 14 days notice that his file would be closed if he did not show up but the plaintiff apparently declined
B to turn up. Defendant explained that he required the medical report to plead the injuries in the claim and to quantify the damages from the injuries in the medical report. Hence without the police report number to obtain all relevant documents from the police and without the plaintiff's medical report, defendant expressed that he
C would not be able to determine the liability and the quantum. Consequently he would not be able to proceed to file the claim in court although he had put up a draft. This court can sense the frustration in the defendant when plaintiff failed to turn up for 1 1/4 years after retainer. Learned counsel for the plaintiff contended
D that the defendant could have advised the plaintiff to lodge a fresh police report and to proceed with the claim as injuries could be obtained from the plaintiff without having to wait for the medical report. He referred to *Solicitors' Duties And Liabilities* by Roger Billins 1999, pp. 147-152 that '(1) It is the duty of a solicitor when
E consulted by a client concerning a contentious matter to undertake a proper investigation of the cause so that he and counsel (if instructed) can advise whether there is a claim or sustainable defence ... (2) If the solicitor is of the opinion that there is no cause of action or good defence then it is his duty to advise the
F client accordingly and to ensure that he has understood it *(Jacks v. Bell)* [1828] 3 C & P 316'. However, all these could only be done if the plaintiff had called on defendant's office as requested *vide* his letters and gave further and proper instructions. In cases where the clients are not prepared to cooperate, action of the solicitor would
G certainly be curtailed. All the most if the client simply declines to show up in his solicitor's office, there is nothing more that the solicitor could do apart from writing to the client and ultimately to discharge himself from acting when the client fails to respond at all. This approach or practice was apparently also taken by Messrs.
H Hanif & Chew.

[13] Undoubtedly, it is negligence of a solicitor if he fails to comply with crucial time limits or if he delays proceedings so that his client's claim becomes statute-barred; see *Fletcher & Son v. Jubb*
I *Booth & Helliwell* [1920] 1 KB 275 CA. However, if he has discharged himself well before the expiry of the limitation period for

good and valid reasons, the issue of negligence can no longer arise nor can negligence be attributed to him.

[14] Reverting to the evidence during cross-examination of the plaintiff and his credibility, in addition to what had been recapitulated above, I must say that there are multiple material inconsistencies and contradictions as well as the demeanour of evasiveness in answering the questions, all of which give rise to a grave doubt as to plaintiff's credibility as a truthful witness. Plaintiff said that when he was at Penang Hospital after the accident, he had a lodged a police report. This police report was not produced in court and when he was challenged to bring a copy of the said report, he said:

S. Boleh anda membawa salinan Polis kemudian hari?

J. Saya tidak mampu untuk membawa laporan polis tersebut.

[15] Defendant challenged that there was no police report lodged by the plaintiff in the hospital and referred the charges as contained in defendant's own bundle of documents: bundle C pp. 89 and 90, of driving without a valid licence on 10 September 1996 at about 4.30am and for late lodgement of a police report, plaintiff said he could not remember whether he had pleaded guilty and paid the fine for those charges and in fact could not remember those charges nor could he remember what transpired in court. On the next breath, he agreed he did not have a valid driving licence and had lodged the police report of this accident late. He agreed he lodged the police report about seven years after the accident and it was Mr. Darshan Singh, his present counsel who instructed him to lodge this report. When he was challenged further on his evidence of his report lodged while he was in Hospital, he gave the following answer:

S. Jika anda kata telah membuat laporan Polis semasa di Hospital, mengapa kamu mengaku salah atas kesalahan gagal melaporkan kemalangan dalam tempoh 24 jam menurut Ikatan B ms 90?

J. Saya tidak tahu menjawab soalan ini.

[16] I find that it is improbable that plaintiff had lodged a police report in hospital as he had alleged. If he did, and if there was one, there is no reason for his present solicitor to have instructed him to lodge a fresh report seven years later.

[17] Plaintiff said the rider who collided into him is his cousin (PW2). Similarly, plaintiff agreed that PW2 also lodged a police report about seven years later and three days after he/the plaintiff had lodged his police report. Plaintiff agreed that there were no sketch plan, photographs showing the scene of the accident and damages to the motorcycles etc from the police nor the outcome of the police investigation. As to how the accident occurred, plaintiff said the accident happened while he was on his way home and had not reached his house. However, PW2, who allegedly rode the other motorcycle which collided with the plaintiff said the accident occurred after the plaintiff had returned home and went out again. It appears that they lived in the same house. This glaring contradiction was not explained. Digressing to the evidence of PW2, PW2 explained that he did not lodge a police report soon after the accident as he thought the matter could be resolved within the family since he did not have a driving licence. He said after the accident he had been paying the plaintiff but could not afford to do so and that was when he was asked to lodge the report. He did so because at the time of lodging the report, he had a driving licence.

[18] I find this evidence to be highly improbable. In the first place, if PW2's motorcycle was insured, the insurance company would have to bear the injuries claim of the plaintiff. Secondly it was never pleaded that PW2 was the rider of the motorcycle who collided with the plaintiff nor the fact that PW2 had since been paying damages to the plaintiff. Plaintiff did not say in his evidence that PW2 had been paying him damages after the accident. Thirdly, the collision according to PW2 was severe impact due to great speed, yet PW2 sustained minor injuries with no medical evidence. There is also no repair bills to his motorcycle. Lastly, PW2's evidence contradicted plaintiff's evidence as stated above which was unexplained. Hence, I find no reason to attach weight to PW2's evidence.

[19] Plaintiff also claimed that he could not walk and has to be wheel-chair bound (he came to court on a wheel chair) but when being referred to his medical specialist report (bundle B pp. 99-101) in cross-examination where plaintiff was seen by Consultant Orthopedic Surgeon on 15 August 2003 which is also about seven years after the accident, he changed to say that he could walk with 'tongkat' but disagreed with the specialist's finding which said that he could walk with full weight bearing. Nevertheless, plaintiff agreed that after the said accident, he had worked with four companies

namely Twenty Leith Street Sdn. Bhd., MJ Reject Shop, SMCI Globetronics Technology and Len Hoe Electrical Engineering. He could not walk but yet he could work. The doubt is obvious. One other fact disclosed in his cross-examination is that plaintiff was involved in another accident on 8 November 1999. Though defendant's solicitor had written to plaintiff's solicitors requesting plaintiff to be present at the Gleneagles Medical Centre for a second medical opinion on plaintiff's medical condition, plaintiff failed to attend giving reason that he had no money and there was no one to bring him; exhs. D2 and D3 are referred. I find this to be another unreasonable excuse. Plaintiff could have obtained the assistance if he wanted to and had made an effort to do so. His failure to be examined by another medical specialist on invitation by the learned counsel for the defendant has given rise to a doubt as to whether plaintiff's medical condition was as a result of or perhaps aggravated by his second accident on 8 November 1999 and was not due to the accident on 10 September 1996 or otherwise. Plaintiff's case, as a whole, is full of doubts and uncertainties and there is no attempt to erase them.

[20] As to damages that the plaintiff had pleaded, I must agree with the submission of learned counsel for the defendant that there is absolutely no evidence to prove the special and general damages. Plaintiff himself admitted he has no evidence to prove the special damages and the medical reports as enclosed in the plaintiff's bundle B were not proved and produced as exhibits nor did the plaintiff call any of the doctors to testify as to his medical conditions. Learned counsel for the plaintiff submitted that the general damages need not be proved but are to be assumed. I find it to be a misnomer for learned counsel to say damages can be assumed. I presume what the learned counsel for the plaintiff was trying to say is that general damages are to be quantified from the injuries that the plaintiff had sustained. For the purpose of quantification of general damages, the basic requisite element is the proof or evidence of injuries, in the instant case, the plaintiff had failed to prove his injuries which he could have done so by proving the medical reports but failed to do so. The production of plaintiff's photographs showing his scars or injuries does not suffice to prove the kinds of injuries that he had sustained for the purpose of assessment of quantum. The injuries cannot be simply assumed.

A **[21]** On the evidence as a whole and on a balance of probabilities, I find, upon findings of fact, that the plaintiff had failed to prove the negligence alleged against the defendant and the damages that he had pleaded. I also find on a balance of probabilities that the defendant's version is more probable and that the defendant had
B with valid reasons discharged himself from acting for the plaintiff when the plaintiff failed to respond to his letters requesting for information and documents and/or his presence or attendance at defendant's office for further instruction; such discharge was well within the limitation period. Plaintiff's denial that he did not
C receive the defendant's letters D12 and D13 is rejected as this court finds that he is not a credible witness and his mere denial is no defence. Hence when plaintiff finally saw the defendant at the end of 2002, March 2003 and on 16 June 2003, the defendant was no longer acting for the plaintiff having discharged himself three years
D before the limitation period. There is therefore no breach of contract or breach of duty of care.

[22] For the foregoing reasons, the plaintiff's claim is therefore dismissed with costs of RM15,000.

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